Supreme Court of the United States

OCTOBER TERM, 1960

No. 206

GENERAL FOODS CORPORATION, MAXWELL HOUSE DIVISION,

Petitioner,

—against—

SS MORMACSUN, her Engines, Boilers, etc., and MOORE McCORMACK LINES, INC.,

Respondents.

H. L. McKINNON CO., LTD.,

Petitioner,

—against—

SS MORMACSUN, her Engines, Boilers, etc., and MOORE McCORMACK LINES, INC.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The statement of facts contained in Respondents' Brief in Opposition, we consider, presents an incomplete and unfair picture of the factual circumstances and legal principles underlying our petition. Accordingly, we feel compelled to file a brief in reply.

Respondents in their Brief in Opposition state at page 2 under the title, "The Facts" that "In the District Court the case was tried on fact issues." Following this statement the Respondents briefly set forth what they consider to be the facts pertinent to the so-called "fact issues." In the statement Respondents make no mention of the

plugged condition of the overflow and vent pipes in the No. 2 port deep tank. Indeed, plugs or pipes are not mentioned at all in the Brief in Opposition.

We point out again, as we did in our Petition at pages 7 and 8, the significance of the plugged condition of the involved deep tank. It is common ground that unless the overflow pipe was plugged and the air vent capped in the involved tank, the pressure within the deep tank could not have built up to the point where it caused the cover to become unseated and thereby permitted the ballast water to overflow into the 'tween deck where the coffee was stowed. Proctor for Respondents admitted the importance of the plug and cap in oral argument before the Court of Appeals when he stated that Respondents relied on the plugged condition of the deep tank as an error in management and therefore as part of their defense under Section 1304 of the United States Carriage of Goods by Sea Act. We raised, before the District Court and before the Court of Appeals, the legal issue of whether the unfit condition of the deep tank constituted a breach of the Respondents' duties and responsibilities within the meaning of Sections 1303(1) and 1303(2) of the United States Carriage of Goods by Sea Act. The issue, as raised, was never one of fact, as Respondents wish the Court to believe, but always a legal issue.

Respondents seek, in the Brief in Opposition as they have in briefs before the lower courts, to avoid the legal effect of the fact that the tank was unfit for ballasting at New York, and at Boston, by insisting that the vessel was seaworthy when the voyage began in South America, and that the vessel owner's duties and obligations to use due diligence to make the vessel seaworthy ended at that time. *Without denying that the involved voyage was arranged by the owner to be performed in stages*, Respon

dents accuse us of misapprehending the "voyage in stages" doctrine, which, we submit, has the effect of renewing the vessel owner's duty to exercise due diligence to make the vessel seaworthy at the commencement of each stage of the voyage. Our submission is amply supported by the cases of *The Glymont*, 2 Cir., 66 F. 2d 617, and *The Willamina*, 3 Cir., 300 Fed. 5, aff'd 272 U. S. 718, cited at page 24 of our Petition and at page 5 of the Brief in Opposition.

It is not Libellants, but Respondents who misapprehend the "voyage in stages" doctrine as stated by Judge Learned Hand in the case of *The Steel Navigator*, 23 F. 2d 590. Judge Hand explained the doctrine as follows at page 592:

> "This [voyage in stages doctrine], as we understand it, means no more than that, when the demands upon her change as the voyage proceeds, she satisfies her covenant if she is fit at any port for that leg of the voyage immediately following."

Applied to the voyage of the MORMACSURF from Buenos Aires to Montreal, Judge Hand's understanding of the voyage in stages doctrine required that the owner furnish a seaworthy ship upon departure from Buenos Aires. As the demands of the voyage at Buenos Aires required use of the No. 2 port deep tank for the stowage of wool in bales, good cargo practice called for the plugging of the deep tank as a precautionary measure against the wetting of the wool cargo stowed in the tank. With the tank plugged, the vessel was seaworthy for the passage from Buenos Aires to Philadelphia only, *but was unseaworthy for the voyage from South America to Montreal.* The MORMACSURF could not have been made seaworthy at Buenos Aires for the voyage to Montreal, for the reason that different demands upon the vessel during the voyage demanded different types of fitness of the deep tank.

After discharge of the wool cargo from the deep tank at Philadelphia, and after discharge of other cargo at Baltimore, Philadelphia and New York, and after the tank was cleaned by shore agents at Brooklyn, the demands upon the vessel required that No: 2 port deep tank be fit for use in ballasting. This statement of the law finds support in the Second Circuit decision of *The Steel Navigator*, 23 F. 2d 590.

The involved deep tank could only be made fit for ballasting, and the vessel made seaworthy for the stage of the voyage which commenced at New York, and for the following stages of the voyage to Montreal, by the removal of the plugs after the wool cargo had been discharged at Philadelphia. The plugs were not removed after the wool cargo was discharged, and therefore and thereafter the MORMACSURF remained unseaworthy.

Having arranged the voyage of the MORMACSURF in stages for their own benefit, the vessel owners then had the duty under Section 1303(1), we submit, to use due diligence to make the tank fit for the reception of ballast water either at New York or during "the Boston stage" (as Respondents refer to it) or wherever the necessity arose. That the duty of using due diligence on the part of the Carrier to meet its obligations as set forth in Section 1303 does not end at the beginning of the voyage, or at the commencement of any stage of the voyage, but requires fulfillment at each stage, is made clear by Judge Hand in *The Steel Navigator*, *supra*, when he stated, at page 592:

> "If it had been inevitable at Batavia that, if she did not lift the latex at Singapore, she must either there or at Calcutta fill her peak with water ballast, then it might plausibly be argued that her purposes at Batavia contemplated filling the peak at some time, and *if it was not fit at Batavia, it must be made so at*

Singapore, or at Calcutta or wherever the necessity arose." (Emphasis supplied.)

We submit that the owners of the MORMACSURF failed to fulfill their duties under Section 1303(1) of the U. S. Carriage of Goods by Sea Act to make the No. 2 port deep tank fit and seaworthy either at New York or at Boston, and that the non-fulfillment renders them liable for the damage in suit.

Respondents' efforts to distinguish petitioners' cases are ineffectual.

The Privy Council in the case of *The Maurienne* [1939], A. C. 589 states in broad terms that Article III, Rule 1 of the Canadian Water Carriage of Goods Act (Section 1303(1) of the U. S. Carriage of Goods by Sea Act) must be fulfilled before the carrier may enjoy the immunities of Article IV (Section 1304 of the United States Act). We submit that the circumstance that the damage resulting from the non-fulfillment of Article III, Rule 1, occurred before the voyage commenced, rather than after, was immaterial to the determination of *The Maurienne* case. We submit that, had the damage occurred after the voyage began, the Privy Council would have found the vessel owner liable, just as it did, for failing to meet the requirements of Article III, Rule 1. We submit that the Privy Council would agree with Judge Hand's statement in *The Steel Navigator*, *supra*, last quoted above, that, when the owner fails to fulfill his obligations under Article III, Rule 1, of the Canadian Act, or Section 1303(1) of the United States Act, before the voyage or any stage of the voyage commences, the duty continues after the vessel breaks ground and until the time the duty is discharged.

Respondents' comments on the cases of *The Glymont*, 2 Cir., 66 F. 2d 617, and *The Willdomino*, 300 Fed. 5, aff'd

272 U. S. 718, are precisely in point with our own references to these cases and serve to underscore our submission that, when a voyage is arranged in stages for the owners' benefit, the owners have the duty at intermediate stages to exercise due diligence to make the vessel seaworthy.

The case of *The Elkton*, 2 Cir., 49 F. 2d 700, involved, in part, the factual question of whether the ship's officers had knowledge of the unseaworthy condition of the double bottom tank. The court held the owner liable regardless of the knowledge or lack of knowledge of the ship's officers.

Concluding Remarks

In the final analysis, the language of Section 1303 sets forth the duties and obligations of Respondent Shipowner, for the primary purpose of protecting the cargo against damage caused by unseaworthiness, and/or by incompetent manning, and/or by the failure of the water carrier, or its agents or servants, including the ship's personnel, to make the ship fit and safe for the carriage and preservation of cargo, and further to exercise care in the custody of the cargo. On the other hand, the language of Section 1303, when compared with the language of Section 1304 granting immunity, *inter alia*, with respect to damage to cargo caused by negligence in the management of the ship, it becomes apparent, we submit, that it was the intention of Congress to grant such immunities conditioned upon the fulfillment by the Shipowner of its obligations set forth in Section 1303. Accordingly, Section 1303 should be construed, we submit, as a section which overrides Section 1304. Further, as decisions herein set forth hold, the obligations of the carrier; itemized in Section 1303, must be met by the carrier at the commencement of each stage of the voyage, and thereafter until the discharge of the cargo carried is accomplished.

CONCLUSION

We respectfully submit that Libellants' petition for a writ of certiorari should be granted.

Respectfully submitted,

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